

memorandum

date:

from: Area Counsel
(Financial Services and Health Care:Manhattan)

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2. How should an extension of the statute of limitations in this case be worded?

3. Are the shareholders of [REDACTED] liable as transferees for any employment taxes of [REDACTED] for the year [REDACTED]?

Facts:

This advice is subject to review by the National Office.

[REDACTED] (EIN [REDACTED]) filed Form 940, Employer's Annual Federal Unemployment (FUTA) Tax Return, and Forms 941, Employer's Quarterly Federal Tax Return, for the year [REDACTED]. [REDACTED] also filed a Form 1120S, U.S. Income Tax Return for an S Corporation, for the year [REDACTED]. The Form 1120S indicates that [REDACTED] elected to be an S Corporation on [REDACTED]. There are four shareholders listed on the Form 1120S for the year [REDACTED].

A Form SS-10 was signed by the Chief Executive Officer of [REDACTED] extending the statute of limitations for assessment of employment taxes for [REDACTED] for the year [REDACTED] to [REDACTED]. The taxpayer added "(IN DISSOLUTION)" to the name of the company on the Form SS-10. A letter dated [REDACTED] from the taxpayer's counsel states that "[a]s the Court Order and related documentation make clear, [REDACTED] as a functioning entity no longer exists. However, for purposes of the statute of limitations extension ... we believe it is appropriate for that extension to be signed by '[REDACTED] in Dissolution', with the signature of its former president affixed."

The [REDACTED] letter states that [REDACTED] "was engaged in two principal businesses, namely the [REDACTED] and the [REDACTED]."

[REDACTED] entered into a Purchase and Assumption Agreement with [REDACTED] ("[REDACTED]") dated as of [REDACTED] whereby [REDACTED] agreed to purchase from [REDACTED] certain assets and assume certain liabilities of [REDACTED] with respect to its banking business.

Article VI, Section 6.16, of the Purchase and Assumption Agreement with [REDACTED] generally provides that [REDACTED] will pay all material taxes which have been incurred on or prior to the Closing Date. There is no evidence provided to our office that establishes that [REDACTED] assumed any liability for employment taxes of [REDACTED] for the year [REDACTED].

An Order of Dissolution dated [REDACTED] from the Supreme Court of the State of New York, County of New York, states that

the Court signed a closing order dated [REDACTED] declaring the business of [REDACTED] closed and directing [REDACTED] to "wind up its affairs". The Order of Dissolution states that [REDACTED] is "hereby declared to be dissolved" and that "[u]pon the filing of a certified copy of this Order with the Superintendent, the Company shall cease to exist". A Certificate of Service states that on [REDACTED] a certified copy of the Order of Dissolution was served on the Acting Superintendent of Banks.

The [REDACTED] letter states that "[t]he assets of the [REDACTED] (consisting essentially of the [REDACTED]) were ... distributed to its sole shareholder, [REDACTED] and [REDACTED], which is conducting the [REDACTED] that had heretofore been conducted by the [REDACTED]."

Law:

I.R.C. § 6501(a) provides the general rule that the amount of any tax shall be assessed within three years after the return was filed. I.R.C. § 6501(c)(4) provides an exception to the general rule. I.R.C. § 6501(c)(4) states that "Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title ... both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

General Corporate Provisions:

An officer of a corporation may execute a consent. I.R.C. § 6061 requires, except as otherwise provided by I.R.C. § 6062 (signing of corporation income tax returns) and I.R.C. § 6063 (signing of partnership returns of income), that any return, statement, or document required to be made under any internal revenue laws or regulations must be signed in accordance with the applicable forms or regulations. The regulations under I.R.C. § 6501(c)(4) do not specify who may sign consents executed under that section. Rev. Rul. 83-41, 1983-1 C.B. 349, provides that the Internal Revenue Service will generally apply the rules applicable to the execution of original returns to consents to extend the period of limitation for assessment. Thus, the rules applicable to the execution of corporate employment tax returns are used to determine which individuals are authorized to sign a consent for a corporation.

Treas. Reg. § 31.6061-1 with respect to employment taxes states that each return required under the regulations in that subpart shall be signed by the president, vice president, or other principal officer, if the person required to make the return is a corporation.

Rev. Rul. 83-41 provides that "in states in which a dissolved corporation continues in existence for purposes of winding up its affairs, any authorized officer of the corporation may sign a consent during the period the corporation continues in existence under state law."

S Corporation Provisions:

I.R.C. § 1361(a)(1) provides in general that the term "S corporation" means, with respect to any taxable year, a small business corporation for which an election under I.R.C. § 1362(a) is in effect for such year.

I.R.C. § 1361(a)(2) provides that the term "C corporation" means, with respect to any taxable year, a corporation which is not an S Corporation for such year.

I.R.C. § 1361(b)(1) provides in general, in relevant part, that the term "small business corporation" means a domestic corporation which does not (A) have more than 75 shareholders and (B) does not have as a shareholder a person who is not an individual.

I.R.C. § 1362(a)(1) provides in general that a small business corporation may elect to be an S corporation.

I.R.C. § 6244 generally applies the partnership provisions to S corporations for taxable years beginning before January 1, 1997. I.R.C. § 6244 was repealed for years beginning January 1, 1997 or later. See P.L. 104-188.

The employment taxes at issue are imposed on [REDACTED] not the shareholders of [REDACTED]. See I.R.C. §§ 3102 and 3111 and Griffin v. Commissioner, T.C. Memo. 1995-246.

New York Business Corporation Law Article 10 § 1005(a)(2) (2000) provides that after dissolution the corporation shall proceed to wind up its affairs and do all other acts appropriate to liquidate its business.

Transferee Liability Provisions:

I.R.C. § 6901(a)(2) provides, with respect to employment tax that the liability, at law or in equity of a transferee of property shall be assessed in the same manner as the original employment tax liability only if such liability arises on the liquidation of the corporation or on a reorganization within the meaning of I.R.C. § 368(a).

Treas. Reg. § 301.6901-1(a)(2) provides with respect to employment tax that the liability, at law or in equity, of a transferee of property in any case where the liability of the transferee arises on the liquidation of a corporation shall be assessed against such transferee.

I.R.C. § 6901(h) provides that the term "transferee" as used in this section includes distributee.

Treas. Reg. § 301.6901-1(b) provides that the term "transferee" includes the shareholder of a dissolved corporation.

I.R.C. § 6902 provides that the Internal Revenue Service has the burden of proof to show that a petitioner is liable as a transferee of property of a taxpayer, but not to show that the taxpayer was liable for the tax.

The existence and the extent of the transferee liability are determined under the law of the state in which the transfer occurred. See Burns v. Commissioner, T.C. Memo. 1989-395, citing Commissioner v. Stern, 357 U.S. 39 (1958).

The shareholder of a dissolved corporation is liable as a transferee for the employment taxes of the corporation under New York state law. See Satnick v. Commissioner, T.C. Memo. 1978-289, and Kreps v. Commissioner, 351 F.2d 1 (2d Cir. 1965).

Rev. Rul. 83-41 states that "shareholders liable under section 6901 of the Code as transferees may sign consents for their own liabilities".

I.R.C. § 6901(c) provides, in part, as follows:

"(c) **PERIOD OF LIMITATIONS.** - The period of limitations for assessment of any such liability of a transferee...shall be as follows:

(1) **INITIAL TRANSFeree.** - In the case of the liability of an initial transferee, within 1 year after the expiration of the period of limitation for assessment against the

transferor"

I.R.C. § 6901(d)(1) provides, in part, as follows:

(d) **EXTENSION BY AGREEMENT.** -

(1) **EXTENSION OF TIME FOR ASSESSMENT.** - If before the expiration of the time prescribed in subsection (c) for the assessment of the liability, the Secretary and the transferee... have both consented in writing to its assessment after such time, the liability may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

Discussion:

Issue 1. Who has authority to sign an extension of the statute of limitations to assess with respect to employment taxes of [REDACTED] for the year [REDACTED]?

The issue is who has authority to sign an extension of the statute of limitations to assess with respect to employment taxes of [REDACTED] for the year [REDACTED]. The answer to this question is affected by whether the employment taxes are a corporate level or shareholder level item for the year [REDACTED]. If the employment taxes are a corporate level item, then someone with authority to sign for [REDACTED] should sign the extension of the statute of limitations to assess with respect to employment taxes for [REDACTED] for the year [REDACTED]. If the employment taxes are a shareholder level item, then the shareholders would sign the extension of the statute of limitations for employment tax for their year [REDACTED].

To determine whether the employment taxes are a corporate level or shareholder level item for the year [REDACTED] in this case, the S corporation provisions of the Internal Revenue Code should be examined.

[REDACTED] meets the definition of an S corporation for the year [REDACTED] including the facts that it is a domestic corporation which does not have more than 75 shareholders and apparently does not have as a shareholder a person who is not an individual provided that the trusts who are shareholders meet the definition in I.R.C. § 1361(c)(2). See I.R.C. §§ 1361(b)(1) and 1361(c)(2). Furthermore, [REDACTED] filed a Form 1120S for the years [REDACTED] as an S corporation.

With regard to whether employment taxes are a corporate level or shareholder item, I.R.C. § 6244 generally applies the partnership provisions to S corporations for taxable years beginning before January 1, 1997. I.R.C. § 6244 was repealed for years beginning January 1, 1997 or later. See P.L. 104-188. Therefore, for the year 1997, the partnership provisions do not apply to S corporations. The employment taxes at issue are imposed on [REDACTED] not the shareholders of [REDACTED]. See I.R.C. §§ 3102 and 3111 and Griffin v. Commissioner, T.C. Memo. 1995-246. Therefore, the employment taxes at issue are a corporate level item for the year [REDACTED]. The statute of limitations for employment tax to be extended is that of [REDACTED] for the year [REDACTED]. Any extensions of the statute of limitations to assess with respect to employment taxes of [REDACTED] for the year [REDACTED] should be obtained from someone with authority to sign for [REDACTED]. There is no need to obtain an extension of the statute of limitations to assess with respect to employment taxes for [REDACTED] for the year [REDACTED] from the shareholders of [REDACTED].

The next part of this question is who can extend the statute of limitations of [REDACTED] for employment tax for the year [REDACTED] given the fact that [REDACTED] has dissolved. Rev. Rul. 83-41 provides that "in states in which a dissolved corporation continues in existence for purposes of winding up its affairs, any authorized officer of the corporation may sign a consent during the period the corporation continues in existence under state law." New York Business Corporation Law Article 10 § 1005(a)(2) (2000) provides that after dissolution the corporation shall proceed to wind up its affairs and do all other acts appropriate to liquidate its business.

Therefore, any authorized officer of [REDACTED] may sign a consent to extend the statute of limitations of [REDACTED] for employment tax for the year [REDACTED] during [REDACTED]'s winding up period. You should determine whether the Chief Executive Officer of [REDACTED] has authority to sign the consent to extend the statute of limitations of [REDACTED] for employment tax for the year [REDACTED] during [REDACTED]'s winding up period.

Issue 2. How should an extension of the statute of limitations in this case be worded?

Since the extension of the statute of limitations to assess with respect to employment taxes of [REDACTED] for the year [REDACTED] can be obtained from any authorized officer of [REDACTED] during [REDACTED]'s winding up period, the Form SS-10 previously signed by the Chief Executive Officer of [REDACTED] with "(IN DISSOLUTION)" added to the name of the company is valid if the Chief Executive Officer has authority to sign for [REDACTED].

Issue 3. Are the shareholders of [REDACTED] liable as transferees for any employment taxes of [REDACTED] for the year [REDACTED]?

The existence and the extent of the transferee liability are determined under the law of the state in which the transfer occurred. See Burns v. Commissioner, T.C. Memo. 1989-395, citing Commissioner v. Stern, 357 U.S. 39 (1958).

The shareholder of a dissolved corporation is liable as a transferee for the employment taxes of the corporation under New York state law. See Satnick v. Commissioner, T.C. Memo. 1978-289, and Kreps v. Commissioner, 351 F.2d 1 (2d Cir. 1965).

Rev. Rul. 83-41 states that "shareholders liable under section 6901 of the Code as transferees may sign consents for their own liabilities."

I.R.C. § 6901(a)(2) provides, with respect to employment tax that the liability, at law or in equity of a transferee of property shall be assessed in the same manner as the original employment tax liability only if such liability arises on the liquidation of the corporation or on a reorganization within the meaning of I.R.C. § 368(a).

Treas. Reg. § 301.6901-1(a)(2) provides with respect to employment tax that the liability, at law or in equity, of a transferee of property in any case where the liability of the transferee arises on the liquidation of a corporation shall be assessed against such transferee.

A [REDACTED] letter from [REDACTED]'s counsel states that "[t]he assets of the [REDACTED] (consisting essentially of the precious metal inventory) were ... distributed to its sole shareholder, [REDACTED], [REDACTED] and [REDACTED], which is conducting the precious metals business that had heretofore been conducted by the [REDACTED]."

Since [REDACTED], [REDACTED] and [REDACTED] was a shareholder of a dissolved corporation ([REDACTED], [REDACTED], [REDACTED] and [REDACTED] is liable as a transferee for the employment taxes of [REDACTED] under New York state law.

Since [REDACTED], [REDACTED] and [REDACTED] liability as a transferee of property of [REDACTED] arose on the liquidation of [REDACTED], any such employment tax liability can be assessed against [REDACTED], [REDACTED] and [REDACTED] as a transferee.

You should attempt to obtain an agreement that [REDACTED], [REDACTED] and [REDACTED] is liable as a transferee for the employment tax liabilities of [REDACTED] for the year [REDACTED].

I.R.C. § 6901(c) provides, in part, as follows:

"(c) **PERIOD OF LIMITATIONS.** - The period of limitations for assessment of any such liability of a transferee...shall be as follows:

(1) **INITIAL TRANSFeree.** - In the case of the liability of an initial transferee, within 1 year after the expiration of the period of limitation for assessment against the transferor"

Under I.R.C. § 6901(c)(1), the statute of limitations for assessment of liability of [REDACTED], [REDACTED] and [REDACTED] as transferee for employment tax liabilities of [REDACTED] for the year [REDACTED] expires one year after the statute of limitations for assessment against [REDACTED].

I.R.C. § 6901(d)(1) provides, in part, as follows:

(d) **EXTENSION BY AGREEMENT.** -

(1) **EXTENSION OF TIME FOR ASSESSMENT.** - If before the expiration of the time prescribed in subsection (c) for the assessment of the liability, the Secretary and the transferee... have both consented in writing to its assessment after such time, the liability may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

You should attempt to obtain an extension of the statute of limitations for assessment of transferee liability from [REDACTED], [REDACTED] and [REDACTED] as a transferee for the employment tax liabilities of [REDACTED] for the year [REDACTED].

Conclusion:

1. Any extensions of the statute of limitations to assess with respect to employment taxes of [REDACTED] for the year [REDACTED] should be obtained from someone with authority to sign for [REDACTED]. There is no need to obtain an extension of the statute of limitations to assess with respect to employment taxes for [REDACTED] for the year [REDACTED] from the shareholders of [REDACTED]. Any authorized officer of [REDACTED] may sign a consent to extend the

statute of limitations of [REDACTED] for employment tax for the year [REDACTED] during [REDACTED]'s winding up period. You should determine whether the Chief Executive Officer of [REDACTED] has authority to sign the consent to extend the statute of limitations of [REDACTED] for employment tax for the year [REDACTED] during [REDACTED]'s winding up period.

2. Since the extension of the statute of limitations to assess with respect to employment taxes of [REDACTED] for the year [REDACTED] can be obtained from any authorized officer of [REDACTED] during [REDACTED]'s winding up period, the Form SS-10 previously signed by the Chief Executive Officer of [REDACTED] with "(IN DISSOLUTION)" added to the name of the company is valid if the Chief Executive Officer has authority to sign for [REDACTED].

3. Since [REDACTED], [REDACTED] and [REDACTED] was a shareholder of a dissolved corporation ([REDACTED]), [REDACTED] and [REDACTED] is liable as a transferee for the employment taxes of [REDACTED] under New York state law.

Since [REDACTED], [REDACTED] and [REDACTED] liability as a transferee of property of [REDACTED] arose on the liquidation of [REDACTED], any such employment tax liability can be assessed against [REDACTED], [REDACTED] and [REDACTED] as a transferee. You should attempt to obtain an agreement that [REDACTED], [REDACTED] and [REDACTED] is liable as a transferee for the employment tax liabilities of [REDACTED] for the year [REDACTED]. Under I.R.C. § 6901(c)(1), the statute of limitations for assessment of liability of [REDACTED], [REDACTED] and [REDACTED] as transferee for employment tax liabilities of [REDACTED] for the year [REDACTED] expires one year after the statute of limitations for assessment against [REDACTED]. You should attempt to obtain an extension of the statute of limitations for assessment of transferee liability from [REDACTED], [REDACTED] and [REDACTED] as a transferee for the employment tax liabilities of [REDACTED] for the year [REDACTED].

This advice relates solely to the facts of this case and should not be used or applied to the facts of any other case.

PROCEDURAL CONSIDERATIONS

Please note that Section 3461 of the Restructuring and Reform Act of 1998, codified in I.R.C. § 6501(c)(4)(B), requires the Service to advise taxpayers of their right to refuse to extend the statute of limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Service requests that the taxpayer extend the limitations period. To satisfy this requirement, you may provide Publication 1035, "Extending the Tax

Assessment Period," to the taxpayers when you solicit the consents. Alternatively, you may advise the taxpayers orally or in some other written form of the I.R.C. § 6501(c)(4)(B) requirement. In any event, you should document your actions in this regard in the case files.

In addition to the recommendations made herein, we further recommend that you pay strict attention to the rules set forth in the IRM. Specifically, IRM, Handbook No. 104.6, Section 13.2, requires use of Letter 907(DO) to solicit a Form SS-10 as well as Letter 928(DO) as a follow-up letter to Letter 907(DO). Dated copies of both letters should be retained in the case file(s) as directed. When the signed Forms SS-10 are received from the taxpayer the responsible manager should promptly sign and date them in accordance with Treasury Regulation § 301.6501(c)-1(d) and IRM, Handbook No. 104.6, Section 13.4. The manager must also update the respective statutes of limitations in the continuous case management statute control files and properly annotate Form 895 or equivalent. See IRM, Handbook No. 104.6, Section 13.4. This includes Form 5348. In the event a Form SS-10 becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

If you have any questions, please call Michael Wilder at (212) 264-5473, Extension 226.

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By: _____
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